Kamalul Annuar Abdul Rahman v First TAZ Money Brokers Sdn Bhd (formerly known as Pyemas Sdn Bhd)

HIGH COURT (KUALA LUMPUR) — CIVIL NO D4(S6)–22–1316 OF 2002
ABDUL WAHAB PATAIL J
21 MARCH 2006

Labour Law — Employment — Termination of employment — Dismissal — Whether plaintiff estopped from filing for wrongful dismissal

Labour Law — Employment — Dismissal — Dismissal without just cause — Removed from position by passing of shareholders' resolution — Whether removal by way of resolution amounted to a 'dismissal' within meaning of s 20 of Industrial Relations Act 1967

The plaintiff was a Chief Executive Officer ('CEO') from 1993 until 20 February 1998 wherein the plaintiff was wrongfully dismissed. From 1996 until 1998, the plaintiff was also a director of the defendant. By a letter dated 7 March 1998, the plaintiff disputed the dismissal and demanded reinstatement and restoration of benefits. The defendant then replied on 10 March 1998 reiterating that the plaintiff had been dismissed as CEO. On 17 July 1997, the defendant purported to accept an undated letter of resignation from the plaintiff as director of the defendant via a circular resolution. A police report was lodged against the defendant as regards the said letter. On 1 August 1997, an arrangement was made with the verbal consent of the plaintiff to take leave of absence as CEO and director with full pay and benefits until an independent inquiry and/or police investigation was completed. The plaintiff, however, did not receive the full benefits. On 28 February 2002, the parties entered into a consent judgment which provided that the plaintiff shall have no further or other claims save and except for the enforcement of the consent judgment and the plaintiff's claim for damages in respect of the alleged wrongful dismissal as CEO. On 8 November 2002, the plaintiff filed an action for wrongful dismissal seeking for damages. The issues for the court to determine are: (i) whether the plaintiff was estopped from filing this action in view of the consent judgment dated 28 February 2002; and (ii) whether the plaintiff was obliged to make a complaint under s 20 of the Industrial Relations Act 1967.

Held:

(1) In view of the specific reservation of the right to sue for damages for wrongful dismissal in cl 4(b) of the consent judgment, the plaintiff was not estopped from commencing this action (see para 9). The plaintiff clearly remained as Chief Executive Officer and Director until the consent judgment dated

28 February 2002 which left open and preserved the right of the plaintiff to claim damages in respect of the alleged wrongful dismissal (see para 16).

(2) When a worker has been dismissed without just cause, s 20 states that the worker may make representations in writing to the Director General. In *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, the court held that *'may'* referred to the statutorily available remedy of reinstatement. Since s 20 was an alternative remedy, it does not operate to restrict and require the plaintiff to proceed only under s 20 (see *Manggai v Government of Sarawak* [1970] 2 MLJ 41) (see para 11). Since there were no obligations to make representations in writing to the Director General, the plaintiff was in no way restricted from filing this civil suit. Hence, termination of employment came into effect when the termination was accepted by filing this civil suit in November 2002 (see para 17).

[Bahasa Malaysia summary

Plaintif adalah ketua pegawai eksekutif dari tahun 1993 sehingga 20 Februari 1998 di mana plaintif telah dibuang kerja. Dari tahun 1996 sehingga 1998, plaintif juga merupakan pengarah kepada defendan. Melalui surat bertarikh 7 Mac 1998, plaintif mempertikaikan pemecatan dan menuntut pengembalian kedudukan jawatan dan pengembalian faedah-faedah. Defendan kemudiannya telah menjawab pada 10 Mac 1998 bahawa plaintif telah dibuang kerja sebagai ketua pegawai eksekutif. Defendan dikatakan telah menerima satu surat pemecatan yang tidak bertarikh daripada plaintif sebagai pengarah defendan pada 17 Julai 1997 melalui resolusi pekeliling. Satu laporan polis telah dibuat terhadap defendan berkenaan surat tersebut. Pada 1 Ogos 1997, satu penentuan telah dibuat dengan persetujuan lisan plaintif untuk bercuti kerana ketidakhadiran sebagai ketua pegawai eksekutif dan pengarah dengan gaji dan faedah penuh sehingga satu siasatan berasingan dibuat dan/atau siasatan polis telah selesai. Akan tetapi, plaintif tidak menerima kesemua faedah tersebut. Pada 28 Februari 2002, pihak-pihak telah memasuki satu penghakiman persetujuan yang memperuntukkan bahawa plaintif tidak boleh mempunyai atau tiada tuntutan lain kecuali penguatkuasaan penghakiman persetujuan dan tuntutan plaintif bagi ganti rugi berkenaan dengan pemecatan yang dikatakan salah sebagai ketua pegawai eksekutif. Pada 8 November 2002, plaintif telah memfailkan satu tindakan pemecatan secara salah untuk memohon ganti rugi. Isu untuk ditentukan oleh mahkamah adalah: (i) sama ada plaintif telah diestop daripada memfailkan tindakan ini berdasarkan penghakiman persetujuan bertarikh 28 Februari 2002; dan (ii) sama ada plaintif wajib untuk membuat satu aduan di bawah s 20 Akta Perhubungan Perusahaan 1967.

Diputuskan:

(1) Berdasarkan kepada kesangsian spesifik tentang hak untuk mendakwa berhubung ganti rugi kerana pemecatan dalam kl 4(b) penghakiman persetujuan, plaintif tidak diestop daripada memulakan tindakan ini (lihat perenggan 9). Plaintif dengan jelasnya kekal sebagai ketua pegawai eksekutif dan pengarah sehingga penghakiman persetujuan bertarikh 28 Februari 2002

di mana telah membiarkan dan mengekalkan hak-hak plaintif untuk menuntut ganti rugi berkenaan pemecatan yang dikatakan itu (lihat perenggan 16).

(2) Apabila pekerja telah dipecat tanpa sebab-sebab munasabah, s 20 menyatakan bahawa pekerja boleh membuat representasi secara bertulis kepada Ketua Pengarah. Dalam *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, mahkamah memutuskan bahawa 'may' merujuk kepada remedi statutori pengembalian kedudukan jawatan. Sejak s 20 adalah remedi alternatif, ia tidak menyekat dan memerlukan plaintif untuk beroperasi di bawah s 20 (lihat *Manggai v Government of Sarawak* [1970] 2 MLJ 41) (lihat perenggan 11). Memandangkan tidak terdapat obligasi untuk membuat representasi secara bertulis kepada Ketua Pengarah, plaintif tidak dalam apa-apa keadaan pun menyekat pemfailan guaman sivil ini. Malah, penamatan kerja telah berkuatkuasa apabila penamatan telah diterima melalui pemfailan guaman sivil di dalam bulan November 2002 (lihat perenggan 17).]

Notes

For cases on termination of employment, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1161–1239.

Cases referred to

Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238 (refd)

Manggai v Government of Sarawak [1970] 2 MLJ 41 (refd)

Legislation referred to

Companies Act 1965 s 181
Industrial Relations Act 1967 s 20

Karen Lai (Sean Yeow and CS Mong with her) (Lee Hishammuddin) for the plaintiff.
David Samuel (Peter Jayasuria, S Selvarajah, T Nayagam and DS Prasad with him) (Peter Jayasuria & Co) for the defendant.

Abdul Wahab PatailJ:

[1] The claim by the plaintiff is for damages for wrongful dismissal of the plaintiff by the defendant as chief executive officer ('CEO'). He was employed in that capacity from 1993 until his purported dismissal on 20 February 1998. From 1996 until his dismissal, he was also a director of the defendant.

[2] By a circular resolution on 16 July 1997, the defendant purported to accept a resignation by the plaintiff as a director of the defendant. The plaintiff lodged a police report on 24 July 1997 with regard to the undated purported letter of resignation. At a meeting on 1 August 1997, a resolution was passed that the plaintiff, with his verbal consent, take leave of absence as CEO and director with full pay and benefits until an independent inquiry and/or police investigation is completed.

A **[3]** But he did not receive the full benefits.

[4] By a letter dated 21 January 1998, he requested an explanation why benefits he was entitled to was being withheld. By a letter dated 6 February 1998 received on 16 February 1998, he was informed that pursuant to a Board of Director's meeting **B** on 11 August 1997, his benefits were restricted pending the outcome of police investigations, the use of company car without a driver, maintenance upon approval only, petrol to a maximum of RM300, monthly fees to a golf club and house, mobile telephone charges to a maximum of RM250 and entertainment allowance which were to be reviewed pending outcome of the police investigations or three months, whichever is the earlier.

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[5] Since 1 August 1997 arrangement was for the plaintiff to take leave of absence with full pay and benefits until an independent inquiry and/or police investigation is completed was with his verbal consent, a contact came into existence to maintain that position and cannot be altered unilaterally by either party. The plaintiff is bound **D** to take and stay on leave of absence. The defendant is bound to maintain the terms and conditions agreed upon, on full salary and benefits.

[6] Subsequently, by a letter dated 20 February 1998, the defendant informed the plaintiff that he was dismissed. By a letter dated 7 March 1998, the plaintiff disputed **E** his dismissal and demanded reinstatement and restoration of benefits. The defendant's reply dated 10 March 1998 reiterated that the plaintiff had been dismissed as CEO.

[7] The plaintiff had previously filed a petition under s 181 of the Companies Act **F** 1965 against, amongst others, the defendant. On 28 February 2002, the parties entered into a consent judgment which provided that the plaintiff shall have no further or other claims save and except for the enforcement of the consent judgment and the plaintiff's claim for damages in respect of the alleged wrongful dismissal as CEO. This action seeking damages for wrongful dismissal was filed on 8 November 2002.

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[8] The first question is whether the plaintiff is estopped from filing this action in view of the consent judgment of 28 February 2002.

H **[9]** In view of the specific reservation of the right to sue for damages for wrongful dismissal in cl 4(b) of the consent judgment, the plaintiff is not estopped from commencing this action. The consent judgment referred to 'damages' for alleged wrongful dismissal is not confined to general damages and does not, therefore, exclude special damages.

I **[10]** The second question is whether the plaintiff is obliged to make a complaint under s 20 Industrial Relations Act 1967.

[11] When a worker feels he has been dismissed without just cause, s 20 provides that he may make representations in writing to the Director General. The Federal

Court in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238 held that 'may' refers to the statutorily available remedy of reinstatement. Since s 20, as held by *Fung Keong* is an alternative remedy, it does not operate as in *Manggai v Government of Sarawak* [1970] 2 MLJ 41 to restrict and require the plaintiff to proceed only under s 20. The plaintiff is not required to have first made representations in writing to the Director General and since there is no obligation, the plaintiff is not in any way restricted from filing this civil suit.

[12] The plaintiff had claimed:

(a) special damages from dismissal from February 1998 until October 2002 of RM1,232,160;

(b) general damages;

(c) interest;

(d) further and other relief as court thinks fit.

[13] On 21 March 2006, this court gave judgment for the plaintiff as prayed with damages equivalent to six months salary, interest at the rate of 8% from the date of this action to full judgment.

[14] The circumstances of the dismissal is particularly messy. An appointment as a director of a company to exercise the powers of a director of a company may be terminated by the shareholders at any time. This was not done. Further, instead of acting under the cl 3 of the letter of appointment dated 3 September 1986 to give three months notice of termination, the defendant took the course of purporting to accept a letter of resignation purportedly by the plaintiff who lodged a report with the police on 24 July 1997. In a meeting on 1 August 1997, a resolution was passed that the plaintiff with his verbal consent take leave of absence as chief executive officer and director with full pay and benefits until an independent inquiry and/or police investigation is completed. No independent inquiry was held and there is no evidence before the court of an outcome of police investigation showing that the letter of resignation was in fact signed by the plaintiff. Even so, this agreement was reneged upon to the extent certain restrictions were subsequently imposed. Then, only by a letter dated 20 February 1998, the plaintiff was informed he was dismissed. This dismissal was disputed by the plaintiff who by his letter of 7 March 1999 demanded reinstatement and restoration of benefits. This was rejected by the defendant's letter of 10 March 1998. He did not accept it.

[15] Although the defendant could, under the terms of the letter of appointment have terminated the plaintiff's appointment by giving three months' notice, by 1 August 1997 there was a further term agreed between the parties with the effect of in part superceding cl 3 of the letter of appointment, in that he would remain as chief executive officer and director, albeit on leave of absence, until an independent inquiry and/or police investigation was completed. The first alternative was fully within the control of the defendant who, however, did not take any action. Police investigation was outside the control of either party.

[16] The result was that the plaintiff clearly remained as chief executive officer and director until the consent judgment of 28 February 2002, which left open and preserved the right of the plaintiff to claim damages in respect of alleged wrongful dismissal.

[17] The court holds that termination of his employment came into effect when he accepted the termination by filing this civil suit in November 2002. For simplicity the termination is deemed to have been accepted at the end of October 2002.

[18] Similar alternative employment in this category would not be easy to seek. Nevertheless, the court is of the view that six months would be a reasonable period from the time he accepted the termination.

[19] For these reasons, the court granted judgment to the plaintiff as prayed with damages equivalent to six months salary.

Order accordingly.

Reported by Janani Suntharalingam